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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. [redacted] 74

CHARLES S. BUTLER AND N. F. T. HAYDEN, COPARTNERS AS BUTLER, HAYDEN & COMPANY, PLAINTIFFS IN ERROR,

vs.

RICHARD CUNNINGHAM AND HENRY TOLMAN, JUNIOR ASSIGNEES IN INSOLVENCY OF DANIEL C. BIRD.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED SEPTEMBER 14, 1886.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 341.

CHARLES S. BUTLER AND N. F. T. HAYDEN, COPARTNERS AS BUTLER, HAYDEN & COMPANY, PLAINTIFFS IN ERROR,

vs.

RICHARD CUNNINGHAM AND HENRY TOLMAN, JUNIOR ASSIGNEES IN INSOLVENCY OF DANIEL C. BIRD.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

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a UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the supreme judicial court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Richard Cunningham, of Wellesley Hills, in the county of Norfolk, and Henry Tolman, Jr., of Newton, in the county of Middlesex, assignees in insolvency of Daniel C. Bird, of Brockton, in the county of Plymouth, plaintiffs, and Charles S. Butler, of said Boston, and N. F. T. Hayden, of Braintree, in said county of Norfolk, copartners as Butler, Hayden & Co., having their usual place of business in said Boston, defendants, in a suit in equity, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Charles S. Butler and N. F. T. Hayden, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-second day of June, in the year of our Lord one thousand eight hundred and eighty-six.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
MARCUS MORTON,
Chief Justice of Supreme Judicial Court of Massachusetts.

1—341

b COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

And now, here, the judges of the supreme judicial court of the Commonwealth of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said supreme judicial court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John Noble, clerk of said supreme judicial court, have hereto set my hand and the seal of said court this third day of July, A. D. 1886.

[SEAL.] JOHN NOBLE, *Clerk.*

1 COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

To all persons to whom these presents shall come, Greeting:

Know ye that among our records of our supreme judicial court, sitting at Boston, in said county of Suffolk, for the hearing of cases in equity, on the fourteenth day of June, in the year of our Lord eighteen hundred and eighty-six, it is thus contained, the following being the entire record in the case:

2 *Bill of Complaint.*

SUFFOLK, *ss:*

In the Supreme Judicial Court.

Between—

RICHARD CUNNINGHAM, of Wellesley Hills, in Our County of Norfolk, and Henry Tolman, Jr., of Newton, in the County of Middlesex, Both Having Their Usual Place of Business in Boston, in said County of Suffolk, as They are Assignees in Insolvency of the Estate of D. C. Bird, of Brockton, in the County of Plymouth, Plaintiffs,

and

CHARLES S. BUTLER, of Boston, in said County of Suffolk, and N. F. T. Hayden, of Braintree, in the County of Norfolk, Copartners Doing Business under the Firm Name of Butler, Hayden & Co., and Having Their Usual Place of Business in said Boston, Defendants.

3 And the plaintiffs say that on the first day of June, A. D. 1885, they were duly appointed assignees in insolvency of the estate of D. C. Bird, of Brockton, in our county of Plymouth, by Jesse E. Keith, Esquire, judge of the court of probate and insolvency within and for said county.

And the plaintiffs further say that on or about the second day of March, 1885, said D. C. Bird, being unable to meet his bills at maturity, suspended payment; that on the thirteenth day of said March

a meeting of creditors was held in the rooms of the Shoe and Leather Exchange, in said Boston, at which meeting a committee was appointed to investigate the affairs of said Bird and make a report thereof; that on the 20th of said March a second meeting of said creditors of said Bird was held, at which the report of said committee was submitted and certain propositions made by said Bird to his creditors and by said creditors to said Bird, at the first of which meetings one of the defendants in person was present and took an active part.

And the plaintiffs further say that on the sixth day of March, 1885, the defendants were and still are creditors of said Bird in the amount of eighteen hundred and twenty-five and $\frac{33}{100}$ dollars; that they were and are citizens of this Commonwealth, and that their said account against said Bird was contracted and payable in said Commonwealth.

4

And the defendants further say that before said sixth day of March, 1885, said Bird had consigned to Aaron Claflin & Co., a firm doing business in the city of New York, certain cases of manufactured shoes, to be sold by said Aaron Claflin & Co. at auction; that said Aaron Claflin & Co. had made certain advances on said goods to said Bird, but on said sixth day of March there was an equity of more than one thousand dollars belonging to said Bird in the hands of said Aaron Claflin & Co.; that said defendants, having been informed by said Bird of the said consignment to said Aaron Claflin & Co., and of the fact that there was an equity over and above the advances in the hands of said Aaron Claflin & Co. on said sixth day of March, well knowing that said Bird had stopped payment and was insolvent, and believing and having reason to believe that proceedings in insolvency were about to be instituted by or against said Bird to avoid the operation of the insolvent law, made a pretended assignment and transfer of said claim against said Bird, in whole or in part, to one Daniel B. Fayerweather, of the city, county, and State of New York; and the plaintiffs say that said assignment to said Fayerweather was without sufficient consideration, and was not intended by said Butler, Hayden & Co. and said Fayerweather as an absolute sale of said account, but was merely a colorable assignment so that said Fayerweather might bring a suit upon the same in his own name, it being understood between said defendants and said Fayerweather that whatever sum of money, benefit, or advantage said Fayerweather could derive from said suit should be when received either paid over or credited to the account of the defendants by said Fayerweather.

And the plaintiffs further say that said defendants, having been informed by said Bird of said equity in the hands of said Aaron Claflin & Co., made the pretended assignment to said Fayerweather as aforesaid with the purpose and intent to obtain a preference over other creditors of said Bird.

And the plaintiffs further say the defendants, at the time of their pretended assignment of their claim against said Bird to said Fayerweather, had reasonable cause to believe that said Bird was insolvent or in contemplation of insolvency, and that the attachment

made by them in the name of said Fayerweather was made in fraud of the laws relating to insolvency, and that said pretended assignment is void.

And the plaintiffs further say the defendants, on said sixth day of March, 1885, had reasonable cause to believe said Bird to be insolvent or in contemplation of insolvency; that said pretended assignment of their claim to said Fayerweather and said suit brought by them in the name of said Fayerweather were made and done by the defendants with a view to prevent the property of said Bird from coming to his assignees in insolvency, and to prevent the same from being distributed under the laws relating to insolvency, and to defeat the object of or in some way impair, hinder, impede, or to delay the operation or the effect of or to evade some of the provisions thereof, and that said pretended assignment is said

And the plaintiffs further say said pretended assignment to void. Fayerweather was not made in the usual and ordinary course of business of the defendants.

Wherefore the plaintiffs pray that the defendants and each of them, their agents, servants, attorneys, and solicitors, may be enjoined and restrained from proceeding to further continue said suit against said Bird begun by the defendants in the name of said Fayerweather, or from collecting or attempting to collect in any manner, by suit or otherwise, whether in the name of said Fayerweather or any other person, for their own benefit, gain, or advantage, from said firm of Aaron Claflin & Co. any money or other thing on account of their said claim against said Bird; that the said defendants be ordered to refrain from further prosecution of said suit in New York, in which said suit said Aaron Claflin & Co. is summoned as trustee or garnishee by reason of their indebtedness to said Bird, as hereinbefore set forth, or that said defendants be ordered to assign to the plaintiffs, as assignees of said Bird in insolvency, all their right, title, and interest, present or prospective, legal or equitable, in and to, by, under, or on account of their claim which they pretend to have assigned to said Fayerweather, so that your orators shall have, as the effect of said order, full right to receive all moneys due said Bird from said Aaron Claflin & Co. without any hindrance or interference upon the part of the defendants therewith, and that your orators may have such other and further relief in the premises as to your honors may seem meet and the necessities of the case require.

May it please your honors to grant unto your orators not only the most gracious writ of subpœna issuing out of and under the seal of this honorable court, directed to the defendants and each of them, commanding them, upon a certain day and under a certain pain therein to be named, personally to appear and be present in this honorable court and to answer, but not under oath, which is distinctly waived, stand to, abide, and perform all and singular the orders and decrees of this court in connection herewith, but also the most gracious writ of injunction issuing out of and under the seal of this honorable court, restraining the defendants and each of them from continuing to prosecute said suit against said Bird, in which said Aaron Claflin & Co. has been summoned as trustee or garnishee, in

the supreme court of the county and State of New York, and from in any way receiving or obtaining unto themselves any benefit, gain, or advantage in any manner by reason of their improper and illegal action in the premises; and your orators will ever pray.

RICHARD CUNNINGHAM.
HENRY TOLMAN, Jr.

6 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

BOSTON, *June* 10, *A. D.* 1885.

Then personally appeared the above-named Richard Cunningham and Henry Tolman, Jr., and severally made oath that they have each read the foregoing bill of complaint and are acquainted with the contents thereof; that the same is true of their own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters they believe the same to be true.

Before me—

MINER R. THOMAS,
Justice of the Peace.

Filed June 19, 1885.

7 This bill was filed in said court on the nineteenth day of June, eighteen hundred and eighty-five, and thereupon a subpœna was issued as prayed for, in which subpœna was an order of notice, both being as follows, to wit:

8 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

To Charles S. Butler, of Boston, in said county, and N. F. T. Hayden, of Braintree, partners as Butler, Hayden & Co., [SEAL.] having their usual place of business in said Boston, Greeting:

We command you that you appear before our supreme judicial court, at the rules to be holden at Boston, within our said county of Suffolk, on the first Monday of July next, then and there to answer to a bill of complaint exhibited against you in our said court by Richard Cunningham, of Wellesley Hills, in the county of Norfolk, and Henry Tolman, Jr., of Newton, as assignees in insolvency of the estate of D. C. Bird, of Brockton, in the county of Plymouth.

And you are hereby notified to appear before some one of the justices of this court, at the court-house, in said Boston, on Saturday, the twentieth day of June, current, at 9¼ o'clock a. m., to show cause why an injunction should not issue as prayed for in said bill of complaint, and to do and receive what our said court shall then and there consider in that behalf.

Hereof fail not, under the pains and penalties in the law in that behalf provided.

Witness Marcus Morton, Esquire, at Boston, the nineteenth day

of June, in the year of our Lord one thousand eight hundred and eighty-five.

HENRY A. CLAPP,
Ass't Clerk.

[Endorsed:] Eq. No. 1474. Subpœna. Richard Cunningham *et al.*, assignees, *vs.* Chas. S. Butler *et al.*

9 On which subpœna and order of notice return of service was made in the words following, to wit:

SUFFOLK, *ss:*

BOSTON, *June* 19, 1885.

I this day summoned the within-named Charles S. Butler to appear and answer at court, as within directed, by delivering to him in hand an attested copy of this precept, and at the same time I summoned the within-named N. F. T. Hayden to appear and answer at court, as within directed, by delivering to said Charles S. Butler, his partner and codefendant, said Butler accepting service for said Hayden.

THOMAS FEE, JR.,
Deputy Sheriff.

Copies	2 00
Service	1 00
Travel	08
	$3 08

This bill was entered at the rules holden at said Boston on the first Monday of July, eighteen hundred and eighty-five, and was thence transferred to the docket of said supreme judicial
10 court during the April term thereof, in said year, when and where the parties appeared, the plaintiffs by Miner R. Thomas Esquire, their attorney, and the defendants by Hyde, Dickinson and Howe, Esquires, their attorneys.

And on the seventh day of July, eighteen hundred and eighty-five, the following order for a temporary injunction was issued, to wit:

SUFFOLK, *ss:*

JULY 7, 1885.

Let a preliminary injunction issue, as prayed, until further order of the court.

OLIVER W. HOLMES, JR.,
J. S. J. C.

And on the fourth day of August, in the year last aforesaid, the defendants filed their answer as follows, to wit:

11 *Defendants' Answer.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Supreme Judicial Court. In Equity.

RICHARD CUNNINGHAM, HENRY TOLMAN, JR., Assignees, *vs.* CHARLES S. BUTLER, N. F. T. HAYDEN. } No. 1474.

The defendants admit the appointment of the plaintiffs as assignees in insolvency of D. C. Bird, as alleged; the suspension of payment by said Bird on or about March 2, 1885; that a meeting of his creditors was held on the thirteenth day of said March; the appointment of an investigating committee of the affairs of said Bird; a subsequent meeting of the creditors on the twentieth day of said March, and that the defendant Hayden was present at one of these meetings, but they deny that he took any active part in any of the proceedings.

The defendants admit that on March 6, 1885, they were creditors of said Bird in the amount of eighteen hundred and twenty-five and $\frac{33}{100}$ dollars; that they are citizens of this Commonwealth; and they say that said debt was for goods sold and delivered by the defendants to said Bird at Boston and Brockton, in this Commonwealth; but as to where said debt was payable they say no special agreement was made in reference thereto between the parties, and there is no agreement in reference to it, unless it be legally inferred from the residences of all the parties that the same was payable within this Commonwealth, as to which point the defendants are ignorant.

The defendants admit the consignment of goods by Bird to Aaron Claflin & Co., of New York, as alleged in the bill, on which certain advances had been made; but as to how the accounts between the consignor and the consignee stood on the sixth day of March
12 the defendants are ignorant, but they are informed there was due from Claflin to Bird on that day between nine and ten hundred dollars.

The defendants deny that they had any reason to believe on March 6 last that proceedings in insolvency were about to be commenced by or against said Bird, and that they then or ever made a pretended assignment or transfer of their said claim to Daniel B. Fayerweather; but, on the contrary, the defendants affirm that they did, on said sixth day of March, make a *bona fide* assignment and transfer in writing and under seal of said claim to said Fayerweather, a copy of which, when procured, they ask leave to file with this answer and as a part thereof. They submit that they had a right to make such assignment at any time before the insolvency of said Bird, and that their rights and the rights of said Fayerweather, who is a citizen of and a resident in the State of New York, under said assignment and transfer cannot in any way be affected by the insolvency of said Bird.

As to all the other allegations in the bill they neither admit them nor deny them, but leave the plaintiffs to prove the same if they are advised the same are material.

And, further, the defendants deny that the plaintiffs are entitled to the relief sought or to any relief, and they pray to be hence dismissed and for their costs.

By their attorney, M. F. DICKINSON, Jr.

Filed August 4, 1885.

Assignment of an Account.

Know all men by these presents that we, Charles S. Butler and N. F. T. Hayden, copartners doing business under the name of Butler, Hayden & Co. at Boston, in the county of Suffolk and State of Massachusetts, in consideration of fifteen hundred dollars to us paid by Daniel B. Fayerweather, of the city, county, and State of New York (the receipt whereof is hereby acknowledged), do hereby sell, assign, and transfer to said Daniel B. Fayerweather all and whatever sum or sums of money now due and becoming due to us from Daniel C. Bird, of Brockton, Mass., upon the open account hereto annexed for merchandise sold and delivered by us to him and upon the sales therein mentioned; to have and to hold the same to the said Daniel B. Fayerweather, with power to collect the same in our or his name, and as our attorney hereunto duly authorized, to his own use.

It is expressly understood, however, that we, the said Butler & Hayden, are forever to be kept and saved harmless by the said Daniel B. Fayerweather from all cost or charge hereafter in any way or manner for and from the expense of the collection of the sum and sums hereby sold and assigned.

13 In witness whereof we have set our hands and seals this sixth day of March, 1885.

(Signed) CHAS. S. BUTLER, [SEAL.]
(Signed) NATH'L F. T. HAYDEN, [SEAL.]
Copartners as Butler, Hayden & Co.

Signed, sealed, and delivered in presence of—
M. F. DICKINSON, Jr.

14 Thence the case was continued into the sitting of the court in September, eighteen hundred and eighty-five, when and where the parties appeared, and on the seventeenth day of September aforesaid the plaintiffs filed their replication as follows, to wit:

Plaintiffs' Replication.

SUFFOLK, *ss:*

Supreme Judicial Court. In Equity.

RICHARD CUNNINGHAM & *al. vs.* CHARLES S. BUTLER & *al.*

And now come the plaintiffs in the above-entitled case and join issue with the defendants' answer.

RICHARD CUNNINGHAM & AL.,
By their att'y, MINER R. THOMAS.

And on the fifth day of February, eighteen hundred and eighty-six, the defendants filed their amended answer by consent as follows, to wit:

Amended Answer.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Supreme Judicial Court. In Equity.

CUNNINGHAM *et al.* *vs.* CHARLES S. BUTLER *et al.* } No. 1474.

And now come the defendants in the above-entitled case and move to amend their answer already filed by adding thereto the following:

And the defendants further say that assuming it to be true (which is not admitted) that the assignment by the defendants to said Fayerweather is invalid, and that the suit brought by Fayerweather in New York is to be considered as brought by these defendants, and the attachment made in that suit an attachment made by these defendants, as is claimed by the plaintiffs, still these plaintiffs are not entitled to any relief.

And the defendants say that the said suit brought in New York was brought in a court of competent jurisdiction; that the attachment proceedings in said suit were regular and in conformity with the laws of New York and gave a valid lien upon the property attached.

That by the statutes of New York any creditor, resident or non-resident, can sue out a writ of attachment against a non-resident debtor.

That said attachment, being made prior to the time when the assignment in insolvency of said Bird took effect, and being made in New York, was not dissolved or affected by said assignment, and the assignee of insolvency of said Bird took the property subject to the said attachment.

And the defendants say that the attachment in New York was by a proceeding *in rem*, good against all the world; that by said at-

tachment a vested interest was gained by judicial proceedings of the courts of the State of New York.

That according to the provisions of the Constitution of the United States full faith and credit must be given in each State to the judicial proceedings of every other State; that the rights and interest gained by said attachment in New York cannot be taken away or impaired by this court without violating the Constitution of the United States.

And the defendants say that the following-named statutes of the State of New York show the law of New York on the subject of attachments: Rev. Stats. N. Y. (7th ed.), Vol. IV; Code Civil Procedure, §§ 635, 636, 638–641, 644, 648, 651, 707; that the following cases—McGinn *v.* Ross, 1 J. & Sp., 346; 11 Abb. Pr. (N. S.), 20; Anthony *v.* Wood, 29 Hun., 346—correctly explain that law, and
17 that art. IV, section 1, of the Constitution of the United States and act of Congress of May 26, 1790 (1 Stats. at Large, p. 122), show the constitutional provisions which determine the rights of these defendants.

By their attorneys, HYDE, DICKINSON & HOWE.

Filed by consent February 5, 1886.

[Endorsed:] Richard Cunningham *et al. v.* Charles S. Butler *et al.*

18 And also on said fifth day of said February the plaintiffs filed their replication to said amended answer as follows, to wit:

Plaintiffs' Replication.

RICHARD CUNNINGHAM *et al.* }
vs. } No. 1474.
—— ——. }

And now comes the plaintiff- and joins issue with the defendant- on the amended answer.

By E. M. JOHNSON,
Of Counsel.

Thereupon, at a hearing on the twenty-third day of said February, the case was reported by the justice who presided at the hearing for the consideration of the full court upon certain questions of law reserved in said report.

And afterwards, to wit, on the eleventh day of May, eighteen hundred and eighty-six, the supreme judicial court for the
19 Commonwealth transmitted to said supreme judicial court for said county of Suffolk the following rescript, to wit:

20 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, May 11, 1886.

In the case of Cunningham *et al. vs.* Butler *et al.* pending in the sup. jud. court for the county of Suffolk—

Ordered, That the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Decree for pl'f-: costs.

Injunction to issue as prayed for.

By the court:

GEO. W. NICHOLS, *Clerk.*

May 11, 1886.

21 Whereupon, at a further hearing, on the fourteenth day of June, eighteen hundred and eighty-six, the following final decree was entered by the court, to wit:

Final Decree.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

RICHARD CUNNINGHAM *et al.* *vs.* CHARLES S. BUTLER *et al.* } In Equity. No. 1474.

This case came on to be further heard, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows:

It is proved that the defendants, citizens and residents of Massachusetts, with full knowledge that Bird, also citizen and resident of Massachusetts, was insolvent, anticipating that there might be proceedings in insolvency in this State, and intending thereby to secure to themselves, to the exclusion of other creditors in Massachu-

22 setts, the avails of the debt owing to Bird by Claflin & Co., residents in New York, nominally transferred their claims to Daniel B. Fayerweather, of New York, and that the suits in New York carried on in the name of said Fayerweather are subject to the control of these defendants and are conducted for their benefit. The attachments made in New York by said Fayerweather by process of garnishment are to be treated, so far as these defendants are concerned, as made by them.

It is therefore ordered, adjudged, and decreed that the said respondents, Charles S. Butler, of Boston, in the county of Suffolk, and N. F. T. Hayden, of Braintree, in the county of Norfolk, copartners in trade doing business under the firm name of "Butler, Hayden & Co.," and having their usual place of business in said Boston, their agents, servants, and attorneys, be perpetually enjoined and restrained from further continuing certain actions at law begun by said

23 respondents in the name of Daniel B. Fayerweather, of the city, county, and State of New York, in the supreme court of said city, county, and State of New York, against one Daniel C. Bird, of Brockton, in the county of Plymouth, named in said bill, and are hereby ordered to assign to the complainants, as assignees in insolvency of said Bird, all the respondents' right, title, and interest, present or prospective, legal or equitable, in and to, by, under, or on account of their claim which they have pretended to have assigned to said Fayerweather as aforesaid and to refrain from any

and all hindrance or interference with the right of said complainants, as assignees of said Bird, to receive from the firm of Aaron Claflin & Co., of the city of New York, any and all moneys due to said Bird by said firm on the second day of March, A. D. 1883; and the said respondents and each of them, their agents, servants, and attorneys, are hereby perpetually enjoined and restrained from collecting or attempting to collect in any manner, either by suit or
24 otherwise, either in the name of said Fayerweather or any other person for the benefit, gain, or advantage of said respondents, any money or other thing on account of their claims against said Bird from said firm of Aaron Claflin & Co.; and it is further ordered, adjudged, and decreed that the complainants do recover of the respondents their costs in this suit, to be taxed by the clerk.

By the court:

JOHN NOBLE, *Clerk.*

June 14, 1886.

And on said fourteenth day of said June a perpetual injunction was issued in accordance with said decree in the words following, to wit:

25 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

To Charles S. Butler, of Boston, in said county, and N. F. T. Hayden, of Braintree, in our county of Norfolk, respondents,
[SEAL.] their agents, attorneys, and counsellors, and each and every of them, Greeting:

Whereas it has been represented unto us, in our supreme judicial court, by Richard Cunningham, of Wellesley Hills, in the county of Norfolk, and Henry Tolman, Jr., of Newton, as assignees in insolvency of the estate of Dan'l C. Bird, of Brockton, in the county of Plymouth, complainants, that they, said complainants, have exhibited a bill of complaint in our said court against you, the said respondents, wherein said complainants, among other things, pray for a writ of injunction against you, the said respondents: Now, therefore, after a full hearing of said bill of complaint and in accordance with the final decree of our said court therein, we, in consideration of the premises, do strictly enjoin and command you, the said respondents, and all and every the persons before named forever to desist and refrain from further continuing certain actions at law begun by you, said respondents, in the name of Daniel B. Fayerweather, of the city, county, and State of New York, in the supreme court of said city, county, and State of New York, against said Daniel C. Bird, of Brockton, as set up in said bill of complaint.

Witness Marcus Morton, Esquire, at Boston, the fourteenth day of June, in the year of our Lord one thousand eight hundred and eighty-six.

JOHN NOBLE, *Clerk.*

26 [Endorsed:] Eq. No. 1474. Writ of injunction. Richard Cunningham *et al.*, assignees, *vs.* Charles S. Butler *et al.*

27 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said court to be hereto affixed.

Witness Marcus Morton, Esquire, chief justice of our said supreme judicial court, at Boston, this twenty-fifth day of June, in the year of Lord one thousand eight hundred and eighty-six.

[SEAL.] JOHN NOBLE, *Clerk.*

27*a* The following is the assignment of errors:

28 *Assignment of Errors.*

UNITED STATES OF AMERICA:

Supreme Court of the United States. October Term.

CHARLES S. BUTLER and N. F. T. HAYDEN, Plaintiffs in Error,
versus
RICHARD CUNNINGHAM and HENRY TOLMAN, Jr., as They are Assignees in Insolvency of Daniel C. Bird, Insolvent Debtor, Defendants.

On a final decree of the supreme judicial court of Massachusetts, holden at Boston, within and for the county of Suffolk, said decree being entered June 14th, A. D. 1886, wherein the said Richard Cunningham, of Wellesley Hills, in the county of Norfolk,
29 and Henry Tolman, Jr., of Newton, in the county of Middlesex, assignees in insolvency of Daniel C. Bird, of Brockton, in the county of Plymouth, are plaintiffs, and the said Charles S. Butler, of said Boston, and N. F. T. Hayden, of Braintree, in said county of Norfolk, copartners as Butler, Hayden & Co., having their usual place of business in said Boston, are defendants.

And the said Charles S. Butler and N. F. T. Hayden assign — errors in the record of the process and decree aforesaid the following, to wit:

The said Butler and Hayden, by way of defence in said suit brought against them as aforesaid, claimed to have and do claim to have certain titles, rights, privileges, and immunities under the Constitution of the United States, and the said final decree is against the said titles, rights, privileges, and immunities specially set up and claimed by them, said Butler and Hayden, under the Con-
30 stitution, especially under article IV, §§ 1, 2, which recite that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."

By virtue of judicial proceedings in the State of New York duly brought in courts of competent jurisdiction said Butler and Hayden obtained liens on certain property in New York. Said liens are good under the laws of the State of New York and could not be taken from the said Butler & Hayden in that State.

The supreme judicial court of Massachusetts by their decree do not give full faith and credit to said judicial proceedings in New York, but deprive said Butler and Hayden of said lien and of all their rights gained by said judicial proceedings in New York; all of which is shown by the record in said case.

By their attorneys, HENRY D. HYDE,
M. F. DICKINSON, Jr.,
HOLLIS R. BAILEY.

31 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

I, John Noble, clerk of the supreme judicial court within and for the county of Suffolk aforesaid, hereby certify that the foregoing is a true copy of the assignment of errors filed in said case.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme judicial court this second day of July, in the year of our Lord one thousand eight hundred and eighty-six.

[SEAL.] JOHN NOBLE, *Clerk.*

32 The following is the opinion of the court:

COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *July* 1, 1886.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Richard Cunningham *et al. vs.* Charles S. Butler *et al.*, decided on the 11th day of May, 1886.

JOHN LATHROP,
Reporter of Decisions.

33 CUNNINGHAM *v.* BUTLER *et al.*

DEVENS, *J.*:

The case as disclosed by the facts agreed and by the additional evidence submitted is substantially as follows:

Daniel C. Bird, a citizen and resident of Mass., was in embarrassed circumstances and indebted to the defendants, also citizens and residents of Mass. After the suspension of payment by Bird the d'f'ts were informed on the night of March 4th & 5th by him that a balance was due him from Aaron Claflin & Co., of New York. On March 6th the def'ts executed an assignment to Fayreweather, a resident of New York, of their claims against Bird, which assignment was made without consideration and without previous communication. On March 11 and 25, 1885, two
34 actions were commenced in New York in the name of Fayreweather on these claims against Bird as def't, Claflin & Co. being summoned as garnishees. Between March 13 and May 20th there were various meetings of Bird's creditors, and a proposition on his part for a composition under the statute was filed by Bird, returnable May 4. (Stat. of 1884, c. 236.) On May 20, 1885, this proposal was withdrawn, regular proceedings in insolvency were continued therein, and on June 1, 1885, the pl'fs were duly ap-

pointed assignees of Bird, in insolvency. No judgment had at this time nor had it at the commencement of this proceeding (or, so far as appears, has it since) been obtained in N. Y. on the claims sued by Fayreweather. Without stating in detail the evidence, it is fairly proved that the def'ts, with full knowledge that Bird was insolvent, anticipating that there might be proceedings in insolvency in this State, and intending to secure to themselves, to the exclusion of other creditors, of the avails of the debt owing to
35 Bird by Claflin & Co., made the transfer of their claims to Fayreweather, and that the suits in N. Y. now carried on in his name are subject to their control and conducted for their benefit. The attachments made in N. Y. by process of garnishment are to be treated, so far as the def'ts are concerned, as made by them.

In Dehon *v.* Foster, 4 Allen, 545, it was held that this court has jurisdiction in equity upon a proper case made to enjoin a citizen of this Commonwealth from availing himself of an attachment of personal property in another State in an action against a debtor who is insolvent under the laws of this Commonwealth and thus preventing the same from coming to the hands of the assignee; and it is no objection that the action was commenced before the institution of proceedings in insolvency if this was done with a knowledge that such proceedings were about to be instituted and with a view to obtain a preference. In the same case, 7 Allen, 57, it was
36 held that the equitable right of the trustee was paramount unless some valid claim or lien existed on the funds, which under the laws of the foreign State would divert them from the assignees if the defendants were compelled to abandon the attachment of them in the courts of that State.

If it be held that the facts in the case at bar are as we find them to be the argument of the defendants is principally directed to showing that the case of Dehon *v.* Foster was erroneously decided, and that it should now be reconsidered and overruled. They contend that the provision of the Constitution of the United States, article 4, S. 1, 2, which enacts that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," was not therein sufficiently considered, and that as the attachment proceedings in N. Y. in the case at bar are judicial proceedings by a court of competent jurisdiction
37 the pl'fs are not entitled to relief, as the courts in that State are entitled to decide to whom the property found therein belongs. They especially rely upon the cases of Green *v.* Van Buskirk, 5 Wall., 308, 7 Wall., 140; Warner *v.* Jaffray, 96 N. Y., 248, and Lawrence *v.* Batchelder, 131 Mass., 506; all of which have been decided since Dehon *v.* Foster.

The case of Green *v.* Van Buskirk may be briefly stated as follows: A, B, & C were residents and citizens of New York. A, being indebted to both B and C, mortgaged certain personal chattels then in Illinois to B. Before the mortgage could be recorded in Illinois or the property delivered there, one of which acts is essential by the laws of Illinois to the validity of the mortgage as against

third parties, although not by the laws of New York, C took an attachment out from one of the courts of Illinois, a proceeding *in rem*, and under the laws of that State in due form levied
38 on and sold the property. B did not make himself a party to this suit in attachment, although he had notice of it and by the law of Illinois a right to make defence to it, but after its termination brought suit in New York against C for taking and converting the chattels. C pleaded in bar the proceedings in attachment and the judgment obtained in Illinois. It was held in the S. C't of U. S., reversing the decision of the sup. court of New York, that in order that "the full faith and credit" required by the Constitution should be given to the judicial proceedings in the State of Illinois the judgment of the court there, that the personal property there situate was subject to this process of attachment, and that the proceeding in attachment took precedence of the prior unrecorded mortgage from A, was binding elsewhere; that, as the effect of the attachment, judgment, levy, and sale was to protect C if sued in Illinois for the property thus acquired, it would
39 protect him when sued in the court of another State for the same transaction, if he justified in the same manner; that the fiction of law that the domicile of the owner draws to it his personal estate yields whenever for the purposes of justice the actual *situs* of property should be examined; that a title acquired under the attachment laws of a State and held valid there would be held valid in another State, even if all parties interested in the controversy were citizens of such other State, and thus as an attachment of personal property in Illinois would take precedence of an unrecorded mortgage executed in another State where record was not necessary it would do so, though the owner of the chattels, the attaching creditor, and the mortgage creditor were all residents of such other State; but the case of Dehon *v.* Foster recognizes the law to be as held by the Sup. C't of U. S. in Green *v.* Van Buskirk. "The case," says Ch. J. Bigelow, "proceeds on
40 the ground that the d'f'ts, if allowed to proceed with their action, will perfect the lien which is now inchoate under their attachment, and will thereby establish a valid title to the property of the insolvent debtors under the laws of Pennsylvania." Holding this to be the law, it is held decided that the act of the def'ts in causing the property of the insolvent debtors to be attached in a foreign jurisdiction tends directly to defeat the operation of the insolvent law in its most essential features; to prevent a portion of the property of the debtors from coming to the assignees, to be equally distributed among their creditors, and to obtain a preference for themselves; that the d'f'ts, being citizens of this State, are bound by its laws, and they cannot be permitted to do any acts to evade or counteract their operation the effect of which is to deprive other citizens of rights which those laws were intended to secure.

41 The case of Lawrence *v.* Batchelder, *ut sup.*, clearly recognizes the ground above stated as that upon which Dehon *v.* Foster proceeds and in no way controverts it. That was a case in

which the attaching creditor, who was a resident in this State, had proceeded to judgment in a foreign State after proceedings in insolvency in this, and had actually collected the amount from funds in the hands of a trustee of the debtor by virtue of his attachment. He was here sued for the amount he had thus collected by the assignees in insolvency. It was there said, referring to the case of Dehon *v.* Foster, "because it was beyond the power of the court to call in question the validity of this lien acquired under the laws of another State it proceeded to enjoin the d'f'ts, over whom the court had jurisdiction, from enforcing in another State their legal rights." It was further held that, the d'f't having been permitted without interference to proceed to judgment, an action at
42 law for the value of the property obtained would not lie against him by the assignee, as there were many rights in equity which courts of law did not recognize at all, for which reason defendants in equity were often enjoined from prosecuting actions at law.

The case of Warner *v.* Jaffray, 96 N. Y., was as follows: A general assignment for benefit of creditors had been made under the general assignment act of N. Y. (Laws of 1877) on M'ch 1, 1881. It was not recorded in Pa. until M'ch 18, where it could only become operative by record so as to effect any *bona fide* purchaser, creditor, &c. Previous to the 18th the def't had brought suit in Pa. and attached property there. He was himself a citizen of N. Y., as were the debtor and his assignee. It was held in a proceeding brought against the creditor in N. Y. that the lien he had acquired in Pa. was saved from the operation of the assignment; that
43 he had the same right to enforce payment of his claim out of the debtor's property that a resident creditor in Pa. had, and that he would not by any order be restrained from pursuing it; but in Warner *v.* Jaffrey the assignment was of an entirely different nature from that made in proceedings in insolvency such as is found in the case at bar. The property of the debtor was not taken for distribution by the law, but by his own voluntary act. The assignment did not operate on the claims of the creditors or place them under any obligations to join in it. They were entirely free to act; could refuse to have anything to do with it; could retain their claims and enforce them afterwards against the debtor or immediately against any property not covered by the assignment. The assignee was a trustee only to the extent that the creditors chose to accept him as such. As he violated no rights of other creditors in pursuing any property not covered by the assignment and
44 was bound in no way thereby, he could not properly have been restrained from seeking his remedy wherever there was attachable property which the assignment did not reach.

The cases relied on by def'ts cannot therefore be deemed to diminish the authority of Dehon *v.* Foster; nor can we see that there is injustice in holding that in a State which has enacted a system for an equal distribution of the assets of an insolvent among his creditors, residents of that State, who are bound by the decree establishing the insolvency, should be restrained from seeking in other

States assets which otherwise might reasonably be expected to come to his assignee.

While the claims of the residents of another State to property there situate might not be set aside or compelled to yield in such State to those of such assignee, yet it could properly be held that where the pursuing creditors were not citizens of the State
45 where process was invoked the courts thereof would not sustain their claim in preference to that of an assignee obtaining title under the laws of another State, certainly if such title was previously acquired. Burlock *v.* Taylor, 16 Pick., 335; Bentley *v.* Whittemore, 4 C. E. Green, 462; Sanderson *v.* Bradford, 10 N. H., 265. It has been decided in Pennsylvania that while the claims of a receiver of a corporation appointed by the courts of another State to property there situate could not be recognized when they came in conflict with those of residents of Pennsylvania, yet that where a receiver of a corporation had been appointed by a court of competent jurisdiction in another State a creditor who resides in that State and is bound by the decree of the court appointing this receiver cannot in an attachment execution recover assets of the corporation which the receiver claims. Bagley *v.* Atlantic, M. & O. R. R. Co., 86 Pa. St., 291.

46 In the case at bar it is true that the def'ts had made their attachment through Fayreweather in New York before there had been an assignment in insolvency in this State actually executed, but this was done with full knowledge on their part that the debtor, Bird, was embarrassed and had suspended payment and necessarily with intent to avoid the effect of the assignment, so far as the property attached was concerned. As residents of this State they cannot be allowed to this extent to defeat the operation of the assignment and thus to obtain a preference over other creditors resident here. They are within the limits of the jurisdiction of this court and amenable to its process, and should be enjoined from prosecuting a suit the effect of which if successful will be to work a wrong and injury to other residents of the State.

Injunction accordingly.

46½ [Endorsed:] Cunningham *vs.* Butler. Certified copy of the opinion of the supreme judicial court.

47 *Report.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Supreme Judicial Court. In Equity.

RICHARD CUNNINGHAM *et al. v.* CHARLES S. BUTLER *et al.*

This case came on to be heard before me upon the pleadings, agreed facts, and the evidence, and is reserved for the consideration of the full court, such decree to be entered as justice may require.

WM. S. GARDNER, *J. S. J. C.*

Agreed Facts.

March 2, 1885, Daniel C. Bird, the insolvent, being unable to meet his bills at maturity, suspended payment. March 13, 1885, a meeting of said Bird's creditors was held and a committee appointed to investigate the affairs of said Bird and make a report. March 20, 1885, a second meeting of Bird's creditors was held and a report was submitted by said committee. April 23, 1885, a proposal for composition under the statute was filed by said Bird, returnable May 4, 1885. May 20, 1885, the composition proposal having been withdrawn, regular proceedings in insolvency were continued therein, and June 1, 1885, the plaintiffs were duly appointed assignees in insolvency of the estate of said Bird by the court of insolvency for our county of Plymouth. The defendant Hayden was present at one of these creditors' meetings. The defendants were creditors of said Bird at the time he suspended payment to the amount of $1,825.33, and were then and are now citizens of Massachusetts. March 8, 1885, the defendants executed to Daniel B. Fayerweather, of New York, the assignment annexed to the defendants' answer. The defendants, on or before March 5, 1885, knew that Bird was in embarrassed circumstance and had suspended payment. Some time prior to March 6, 1885, said Bird had consigned to the firm
48 of Aaron Clafflin & Co., of the city of New York, certain cases of manufactured shoes, to be sold by said Aaron Clafflin & Co. for the account of said Bird, upon which said Aaron Clafflin & Co. had made certain advances to said Bird, but there remained in said Bird as consignor a valuable interest in said goods. March 11, 1885, and March 25, 1885, two actions were commenced in the supreme court of the county and State of New York, in each of which said Fayerweather is named as plaintiff, said Bird as defendant, and said Aaron Clafflin & Co. are summoned as trustees or garnishees by reason of their said indebtedness to said Bird, which actions are brought to recover the amount of said claim against said Bird and are still pending, but no judgment has yet been obtained thereon. Said suits in New York were brought in a court of competent jurisdiction, and the attachments and proceedings were regular and in conformity with the laws of New York.

It is agreed that either party may refer to the statutes of the United States, the statutes of the State of New York, and the several decisions of the State of New York with the same effect as if the same were regularly introduced in evidence.

In addition to the agreed facts above the following evidence, being all the evidence offered by either party in the case, was submitted by the plaintiffs:

Evidence in Full.

DANIEL C. BIRD.

Direct examination by plaintiffs:

Q. What is your full name?
A. Daniel C. Bird.

Q. Where is your residence?
A. Brockton.
Q. What was your business in 1885?
A. Manufacturing shoes.
Q. You are the Mr. Bird of whom Mr. Cunningham and Mr. Tolman are assignees?
A. Yes, sir.
Q. About when did you first know that you were obliged to suspend payment?

(That fact is admitted March 2.)

Q. Come down to March 2; did you see either of the defendants on or about March 2—Mr. Butler or Mr. Hayden?
A. On the night of the 4th or 5th of March I saw Mr Hayden.
Q. Where?
A. In Brockton, in the hotel.
Q. About what time?
A. I should think it was about six o'clock in the evening.
49 Q. Did you have any conversation with him in regard to your financial condition at that time?
A. I did sir.
Q. What was it?

(Objected to as immaterial. Question allowed, and an exception taken to ruling.)

Q. State the conversation with Mr. Hayden on that evening.
A. Do you wish me to state the conversation I had with him?
Q. Certainly; in reference simply to your financial condition.
A. He came to Brockton; he came to Hotel Belmont, where I stopped, and asked me about my matters, and I told him I had to stop payment, which I had done then on the 2d of March.
Q. That fact you told him?
A. Yes, sir. He asked me how much money I owed, and I told him about how much; he wanted to know what I had to pay with, and I told him the balance that ought to be due me in New York by Aaron Claflin & Co.; he wanted to know how much the amount would be; I told him I had some advance on the goods, and if I could handle them I thought I could get about $2,800.
Q. How much did you tell him your liabilities were? Give the whole conversation.
A. He asked me how much I owed; I think I told him about eighteen thousand dollars; he wanted to know what I was going to do; I told him I was going to call a meeting in a few days; I would give a full account of what I owed and what was due me then. I don't think of anything more that was said at that time.
Q. Did you tell him how much your assets were?

(Objected to as leading.)

A. I didn't tell him how much the assets were. I simply told him I would make out a list to show just how the matters stood at their

first meeting. I don't think of anything more that was said at that time.

Q. When was your meeting, Mr. Bird, the meeting of your creditors in insolvency; the first meeting that you called for your creditors before the insolvency?

A. I don't remember.

(Amitted in the answer.)

A. I don't remember the date; it was a short time after.

(No cross-examination.)

50 CHARLES S. BUTLER.

Direct examination by plaintiffs:

Q. What is your full name?

A. Charles S. Butler.

Q. One of the defendants in this case?

A. Yes, sir; and one of the firm of Butler, Hayden & Co.

Q. What consideration did you receive from Mr. Fayerweather for the assignment of that account, sir?

A. The assignment was drawn by Mr. Dickinson and executed by me and Mr. Hayden.

Q. Anything paid you in consideration of that?

A. No, sir.

Q. Have any agreement with Mr. Fayerweather in regard to the assignment?

A. Not any, sir.

Q. Have any conversation with him at all?

A. No, sir.

Q. Did you correspond with him after the assignment was made?

A. I believe there were one or two letters passed on some points.

Q. At the time the assignment was made, on the 6th of March, you had no correspondence with him in reference to that or any conversation with him?

A. No, sir.

Q. You had no consideration for that assignment moving from him?

A. No, sir.

Q. Did you direct him to do anything in relation to that assignment?

A. I left it entirely with my counsel.

Q. Has your counsel told you what has been done with that?

Mr. DICKINSON: If I had it wouldn't be competent evidence.

(No cross-examination.)

RICHARD CUNNINGHAM.

Direct examination *of* plaintiffs:

Q. What is your full name?

A. Richard Cunningham.

Q. You are one of the assignees?

A. Of the D. C. Bird estate.

Q. Have you had any conversation with either of these defendants in relation to the proceedings in New York?

51 A. Yes, sir.

Q. When, please?

A. Some time after the first meeting of the creditors—some time in March—I was one of the committee to go out and examine the accounts, and Mr. Bird made up his accounts that he had with the New York firms, and we asked him——

Mr. DICKINSON: What Mr. Bird said isn't of any account.

Q. The question is whether you had any conversation with either of these defendants.

A. Yes, sir; I was simply telling you how I got at it. I called on the firm of Butler, Hayden & Co. after the first meeting.

Q. Whom did you see there?

A. I saw Mr. Hayden. I asked Mr. Hayden if he had attached D. C. Bird's account with Aaron Claflin. "That," said he, "I suppose we have attached." Said I: "Did you attach for the benefit of the creditors or your own benefit?" Said he: "Perhaps you had better see Mr. Butler about that."

Q. Did you see Mr. Butler?

A. I did.

Q. What did he say?

A. Mr. Butler said Mr. Fayerweather made the attachment. Furthermore, he referred me to his counsel.

52 The United States of America to Richard Cunningham, of Wellesley Hills, in the county of Norfolk, and Henry Tolman, Jr., of Newton, in the county of Middlesex, assignees in insolvency of Daniel C. Bird, of Brockton, in the county of Plymouth, all in the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme judicial court of Massachusetts, wherein Charles S. Butler, of Boston, in the county of Suffolk, and N. F. T. Hayden, of Braintree, in the county of Norfolk, all in the Commonwealth of Massachusetts, — plaintiffs in error and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Marcus Morton this 22d day of June, in the year of our Lord one thousand eight hundred and eighty-six.

MARCUS MORTON,
Chief Justice of Supreme Judicial Court of Massachusetts.

Service accepted this twenty-third day of June, 1886.

RICHARD CUNNINGHAM & AL., *Assignees*,
By their att'y, MINER R. THOMAS.

[Endorsed:] Filed June 24, 1886. Att.: John Noble, clerk.

53 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

I, John Noble, clerk of the supreme judicial court within and for said county of Suffolk, hereby certify that the foregoing are true copies of the record, of the assignment of errors, of the opinion of the court annexed to and transmitted with the record, of the report to the full court by the justice before whom the case was heard, of the agreed facts and evidence in full filed in the case, and of all the proceedings in said suit, with all things concerning the same, together with the original citation, with acknowledgment of service thereon.

54 In witness whereof I hereunto set my hand and affix the seal of said supreme judicial court this third day of July, in the year of our Lord one thousand eight hundred and eighty-six.

[SEAL.] JOHN NOBLE, *Clerk*.

55 *Bond on Writ of Error.*

Know all men by these presents that we, Charles S. Butler, of Boston, in the county of Suffolk, and N. F. T. Hayden, of Braintree, in the county of Norfolk, as principals, and Horace Billings and Horace Eaton, of Boston, as sureties, and all in the Commonwealth of Massachusetts, are held and firmly bound unto Richard Cunningham, of Wellesley Hills, in the county of Norfolk, and Henry Tolman, Jr., of Newton, in the county of Middlesex, as they are assignees in insolvency of Daniel C. Bird, of Brockton, in the county of Plymouth, in the full and just sum of three thousand dollars, to be paid to the said Richard Cunningham and Henry Tolman, Jr., assignees as aforesaid, or their successors in office and their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twenty-second day of June, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately at a sitting of the supreme judicial court of the Commonwealth of Massachusetts, at Boston, within and for the county of Suffolk, in a suit depending in said court between said Richard Cunningham and Henry Tolman, Jr., assignees in insolvency of Daniel C. Bird, plaintiffs, and said Charles S. Butler and N. F. T. Hayden, copartners under the firm name of Butler, Hayden & Co., defendants, a decree was rendered against the said Charles S. Butler and N. F. T. Hayden, and the said Charles S. Butler and N. F. T. Hayden having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Richard Cunningham and Henry Tolman, Jr., assignees as aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said

Charles S. Butler and N. F. T. Hayden shall prosecute their said writ of error to effect and answer all damages and costs if they fail to make said plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

CHAS. S. BUTLER. [L. S.]
N. F. T. HAYDEN. [L. S.]
HORACE BILLINGS. [L. S.]
HORACE EATON. [L. S.]

Signed, sealed, and delivered in presence of—

Witness to Billings & Eaton:
GEO. W. BROWN.

Witness to Butler & Hayden:
H. L. FRENCH.

Approved:

MARCUS MORTON,
Chief Justice of Supreme Judicial Court of Massachusetts.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

[Seal of the Circuit Court, Massachusetts.]

Attest: ALEX. H. TROWBRIDGE,
Deputy Clerk U. S. C. C., Mass. Dist.

[Endorsed:] Copy of bond. Filed in clerk's office of sup. jud. court June 23, 1886. Attest: John Noble, clerk.

Endorsed on cover: Massachusetts supreme judicial court. No. 341. Charles S. Butler and N. F. T. Hayden, copartners as Butler, Hayden & Company, plaintiffs in error, *vs.* Richard Cunningham and Henry Tolman, Junior, assignees in insolvency of Daniel C. Bird. Filed September 14, 1886.

Office Supreme Court U. S.
FILED
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 74.

CHARLES S. BUTLER AND N. F. T. HAYDEN,
Copartners as BUTLER, HAYDEN & CO., *Plaintiffs in Error*

v.

RICHARD CUNNINGHAM AND HENRY TOLMAN, JR.,
Assignees in Insolvency of DANIEL C. BIRD.

BRIEF FOR PLAINTIFFS IN ERROR.

HENRY D. HYDE,
M. F. DICKINSON, JR.,
HOLLIS R. BAILEY,
For Plaintiffs in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 74.

CHARLES S. BUTLER AND N. F. T. HAYDEN, *Co-partners as* BUTLER, HAYDEN & COMPANY, *Plaintiffs in Error*,

v.

RICHARD CUNNINGHAM AND HENRY TOLMAN, JR., *Assignees in Insolvency of* DANIEL C. BIRD.

PRELIMINARY STATEMENT.

The principal facts of the case appear in the agreed statement on p. 19 of printed record. The plaintiffs in error desire to call the attention of the Court to the agreement therein that either party may refer to the statutes of the United States, the statutes of the State of New York and the several decisions of the State of New York, with the same effect as if the same were introduced in evidence.

It is also to be noticed that the property attached in New York was not merely a debt or chose in action, but a valuable interest which Mr. Bird had as consignor in certain specified goods situated in New York. (See Record, p 19.)

QUESTION STATED.

The Massachusetts court having decided as a matter of fact (see printed Record, p. 11) that the attachments in New

York are to be considered as if made by Butler and Hayden, the case now presents but a single question: Can the courts of Massachusetts interfere by injunction or otherwise to deprive Messrs. Butler and Hayden of the rights gained by them under the judicial proceedings instituted by them in New York?

The plaintiffs in error respectfully submit that inasmuch as Messrs. Butler and Hayden, by the judicial proceedings in New York, acquired a valid lien or interest in certain property situated in New York, which lien or interest could not be taken from them in the State of New York, they cannot, under the Constitution of the United States, be deprived of the benefits of said lien or interest by the courts of Massachusetts.

Assignment of Errors.

The said Butler and Hayden, by way of defence in said suit brought against them as aforesaid, claimed to have, and these plaintiffs in error, as their legal representatives, claim to have, certain titles, rights, privileges and immunities under the Constitution of the United States, and the said final decree is against the said titles, rights, privileges and immunities specially set up and claimed by said Butler and Hayden under the Constitution, especially under Art. IV., Sects. 1, 2, which recite that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

By virtue of judicial proceedings in the State of New York, duly brought in courts of competent jurisdiction, said Butler and Hayden obtained liens on certain property in New York. Said liens are good under the laws of the State of New

York, and could not be taken from the said Butler and Hayden in that State. The Supreme Judicial Court of Massachusetts by their decree do *not* give full faith and credit to said judicial proceedings in New York, but deprive said Butler and Hayden and these plaintiffs in error of said lien and of all their rights gained by said judicial proceedings in New York; all of which is shown by the record in said case.

BRIEF OF ARGUMENT.

I.

Meaning of Words "Full Faith and Credit."

The exact point of law to be decided is, as the plaintiffs understand it, this: —

Have the Massachusetts court given full faith and credit to the attachment proceedings in New York?

The position of the Massachusetts court would seem to be that it does give full faith and credit to the attachments in New York even though it enjoins and restrains the attaching creditors from continuing their actions in New York, and even though it orders the attaching creditors to assign to the assignees in insolvency of said Bird "all their right, title and interest, present or prospective, legal or equitable, in and to, by, under or on account of their claim" sued upon in New York, and even though it enjoins said creditors from collecting or attempting to collect in any manner any money or other thing on account of their said claims. (See Record, pp. 11, 12.)

The plaintiffs in error submit that the Massachusetts court is in error as to what is required by the words "full faith and credit" as used in the Constitution.

The meaning of these words has been for a long time well established in this court.

In the case of *Mills* v. *Duryee*, 7 Cranch, 483, Mr. Justice Story says: —

"By the Constitution it is declared that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.'

"By the Act of 26th of May, 1790, Chap. 11, Congress provided for the mode of authenticating the records and judicial proceedings of the State court, and then further declared that 'the records and judicial proceedings authenticated as aforesaid shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from whence the said records are or shall be taken.'

"It is argued that this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument cannot be supported. The act declares that the record duly authenticated shall have such faith and credit *as it has in the State court from whence it is taken.*"

This construction of these words of the Constitution is followed and approved in

Christmas v. *Russell*, 5 Wall. 300,

Green v. *Van Buskirk*, 7 Wall. 145,

and

Crapo v. *Kelly*, 16 Wall. 610, 642.

II.

Attachments as compared with Judgments.

Rights gained by an attachment are entitled to protection equally with those gained by a judgment.

Green v. *Van Buskirk*, 7 Wall. 145.

In this case the question to be decided was, whether the Supreme Court of New York had given to *attachment* proceedings in Illinois the same effect they would have received in the courts of Illinois. (See p. 146, at top.)

In giving the opinion of the court, Mr. Justice Davis says (see p. 148, at bottom) : —

"Attachment laws, to use the words of Chancellor Kent, 'are legal modes of acquiring title to property by operation of law.' They exist in every State for the furtherance of justice with more or less of liberality to creditors. And if the title acquired under the attachment laws of a State and which is valid there, is not to be held valid in every other State, it were better that those laws were abolished, for they would prove to be but a snare and a delusion to the creditor."

In the case of

Warner v. *Jaffrey*, 96 N. Y. p. 259,

it is said by Earl, J. : —

"The fact that these defendants had merely caused the property to be *attached*, and had not yet recovered judgment and caused the property to be sold, does not in principle distinguish this case from that of *Green* v. *Van Buskirk*. If in that case Green had merely caused the safes to be seized by virtue of his attachment, the suit subsequently commenced against him in this State for conversion would have had the same foundation and the same defence. The defendants cannot be treated as tort feasors here for acts perfectly lawful where they were committed. If a judgment in Pennsylvania would have protected them, then the attachments will protect them, and there are no principles of law or equity which authorize any court in this State to restrain them from proceeding in an orderly and lawful way to reap the fruits of their vigilance. We conclude, therefore, that the property of the assignor, situated in the State of Pennsylvania, was liable to attachment there at the suit of these defendants, notwithstanding the previous assignment in this

State; and that the courts of this State, under the Federal Constitution, are bound to respect the liens of the attachments, and to give 'full faith and credit' to the judicial proceedings in the action instituted there."

See also *Jenks* v. *Ludden*, 34 Minn. 482.

III.

Force and Effect of Attachments in New York.

The faith and credit, or (what is the same thing) the force and effect, which the attachment proceedings have in New York, is shown by the following statutes and cases: —

Rev. Stats. of N. Y., 7th ed., Vol. IV.; Code of Civil Procedure, Chap. 7, Title III. Sects. 635, 636, 638–641, 644, 648–651, 654–656, 674–681, 706–708.

Sartwell v. *Field*, 68 N. Y. 341.
Dunlop v. *Patterson Fire Ins. Co.*, 74 N. Y. 145.
Anthony v. *Wood*, 29 Hun. 239.
McGinn v. *Ross*, 11 Abb. Pr. N. S. 20.
Hibernian Nat. Bk. v. *Lacombe*, 84 N. Y. 385.

These statutes and cases show that an attachment in New York can only be made by applying to a judge of the Supreme Court or to a county judge, making affidavit as to the validity of the claim and the grounds for the attachment, and furnishing a bond with sufficient sureties. The judge, in his discretion, makes an order that a warrant of attachment be granted. The warrant is directed to a sheriff, and is subscribed by the judge, and requires the sheriff to attach and safely keep so much of the property as will satisfy the plaintiff's demand, with costs and expenses. The warrant is served by the sheriff taking the property into his actual

custody, or in the case of a demand trusteed, by leaving a copy of the warrant with the trustee or garnishee. The sheriff, under the direction of the Court, must collect any debt or chose in action attached by him, and, if necessary, may bring an action in his own name or in that of the defendant against the garnishee. When an execution is obtained by the attaching creditor, the sheriff must satisfy it out of the proceeds of the property attached.

The decision of the Supreme Court of New York, granting an attachment warrant, is a final judgment, and is not reviewable in the Court of Appeals, except on matters affecting the jurisdiction.

The title of the property attached in New York vests in the sheriff from the time the warrant is served, and is not affected by any subsequent transfer made by the debtor.

Citizens of other States have equal rights with the citizens of New York to sue and attach in the courts of New York, and the courts of New York will not make any distinction between them.

This right of non-resident plaintiffs was fully settled by the case of

Hibernian Nat. Bank v. *Lacombe*, 84 N. Y. 385.

The law is the same in Minnesota, New Hampshire, Connecticut and Illinois.

Jenks v. *Ludden*, 34 Minn. 486.
Kidder v. *Tufts*, 48 N. H. 121, 126.
Paine v. *Lester*, 44 Conn. 204.
Rhawn v. *Pearce*, 110 Ill. 350.

In New Hampshire and Connecticut this right of non-resident plaintiffs to sue and attach is held to be a consti-

tutional right, of which they cannot be deprived by the courts of the different States.

As it is fully conceded in the present case that the attachment proceedings in New York were regular, and in conformity with the laws of New York (see Record, p. 19), and also that the assignees of Bird have no standing in the courts of New York to deprive the attaching creditors of their rights gained by their attachments, these plaintiffs have not felt it necessary to set out at length the New York statutes above referred to.

It is to be noticed also that the equity of the bill brought by the assignees of Bird depends upon the fact that they have no standing in the courts of New York to dispute the validity of these attachments.

If they had such standing their remedy at law would be sufficiently adequate, and there would be no ground for asking relief in equity.

Fuller v. *Caldwell*, 6 Allen, 503.

But if it is not *conceded* that the title of the attaching creditors is superior in New York to that of the assignees appointed in Massachusetts, it is well settled by the cases that such is the fact.

Kelly v. *Crapo*, 45 N. Y. 86.
Hibernian Nat. Bank v. *Lacombe*, 84 N. Y. 385.
Matter of Waite, 99 N. Y. 433.

In *Kelly* v. *Crapo* the attachment in New York was not made until after the assignment in insolvency in Massachusetts, and still it was held that in New York the rights of the attaching creditor took precedence.

This case, to be sure, was reversed in this court,

Crapo v. *Kelly*, 16 Wall. 610,

but only on the ground that the property attached, being upon the high sea, was constructively in Massachusetts at the time of the assignment in insolvency, and so passed by the assignment in Massachusetts. It was conceded (see p. 622) that if the vessel had been in the port of New York at the time of the assignment in insolvency, the attachment proceeding in New York would have held her as against the prior insolvent assignment.

We may also take it as settled that the question whether property situated in New York is subject to attachment by creditors, notwithstanding any assignment made in another State, is to be determined exclusively by the law of New York, the situs of the property.

Green v. *Van Buskirk*, 5 Wall. 307.
Hervey v. *Rhode Island Locomotive Works*, 93 U. S. 664.
Jenks v. *Ludden*, 34 Minn. 486.

IV.

Attachments are Proceedings in rem.

Attachment proceedings are proceedings *in rem*, and if the court has jurisdiction are good against all the world.

Taylor v. *Carryl*, 20 How. 583.
Cooper v. *Reynolds*, 10 Wall. 309.
Pennoyer v. *Neff*, 95 U. S. 724.
Green v. *Van Buskirk*, 7 Wall. 139.

This is equally true of attachments made by trustee or garnishee process.

Whipple v. *Robbins*, 97 Mass. 108.
American Bank v. *Rollins*, 99 Mass. 314.
Garity v. *Gigie*, 130 Mass. 184.
Wallace v. *McConnell*, 13 Peters, 151.

V.

Courts of Equity bound by Constitution.

Courts of equity are bound equally with courts of law to give full faith and credit to the judicial proceedings of other States.

To prohibit a person from availing himself of rights gained by an attachment or judgment, and from taking any steps to enforce those rights, is as much a violation of the provisions of the Constitution as refusing to enforce his attachment or judgment, or refusing to recognize the same when pleaded as a defence.

The case of

Christmas v. *Russell*, 5 Wall. 300–302,

is very much in point. The Legislature or General Court of the State of Mississippi had passed an act forbidding the enforcement in Mississippi of certain judgments recovered in other States. A judgment of the prohibited sort was obtained in Kentucky against a citizen of Mississippi, and an attempt was afterwards made to enforce it in Mississippi. The Mississippi court refused to enforce it. Held on writ of error by this court that the Mississippi statute was unconstitutional as conflicting with the provision of the Constitu-

tion that provides that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State.

Why does not the same reasoning apply to the present case? Here the Supreme Court of Massachusetts by their decree undertake to prohibit the enforcement of a lien or legal right acquired under judicial proceedings in the State of New York.

The case of

Warner v. *Jaffray*, 96 N. Y. 248,

is directly in point. This was a suit by an assignee in insolvency of one Weld, a citizen of New York, against other citizens of New York, seeking to enjoin them from proceeding under attachments made in Pennsylvania after the assignment took effect in New York but before it took effect in Pennsylvania. The Court refused to grant an injunction on the ground that the courts of New York, under the Federal Constitution, were bound to respect the lien of the attachments and to give full faith and credit to the judicial proceedings in Pennsylvania. (See opinion of Court, p. 259.)

This decision has been cited and approved in later New York cases. See

Nicoll v. *Spowers*, 105 N. Y. 4, 5.
Keller v. *Paine*, 107 N. Y. 90.

See also

Bicknell v. *Field*, 8 Paige, 440.

In a still later case (reported since the decision of the Massachusetts court in the case at bar), the Supreme Court of Minnesota has recognized the law as stated in *Warner* v. *Jaffray*. See

Jenks v. *Ludden*, 34 Minn. 483.

This also was a suit to obtain an injunction. A citizen of Minnesota had attached property of an insolvent in Wisconsin. The assignees in Minnesota sought to enjoin him from proceeding with his attachment. The Court refused to grant an injunction, first, because under the United States Constitution it had no right to do so; and secondly, because even if it had the right, it would not be equitable to exercise it, as there were non-resident attaching creditors who would prevent the property coming to the assignees.

Mr. Justice Mitchell in his opinion says: —

"And in this country, as far as we can discover, the case of *Dehon* v. *Foster*, 4 Allen, 545, and 7 Allen, 57, stands alone in assuming to interfere with an attachment lien even on personal property situated outside the State acquired prior to the date of the assignment. . . . Therefore, if by the laws of Wisconsin defendant has acquired a valid lien on this land prior and paramount to the assignment, we can see no ground upon which our courts can assume to deprive him of the benefit of it." See

Warner v. *Jaffray*, 96 N. Y. 248.
Harris v. *Pullman*, 84 Ill. 20.

The case of

Green v. *Van Buskirk*, 7 Wall. 148,

also has a bearing on this point to show that it is not simply when extra State judgments or other judicial proceedings are made directly the basis of an action at law that they must be given full faith and credit. In *Green* v. *Van Buskirk* the attachment proceedings in Illinois were used for the purpose of defending an action brought in New York against the attaching creditor for converting the attached property. Mr. Justice Davis in his opinion, p. 148, says: —

"And, as the effect of the levy, judgment and sale is to protect Green if sued in the courts of Illinois, and these pro-

ceedings are produced for his own justification, it ought to require no argument to show that when sued in the court of another State for the same transaction, and he justifies in the same manner, that he is also protected."

Suppose the present suit had been brought in New York instead of Massachusetts; surely it would have been a sufficient defence for the attaching creditors to plead and produce the record of the attachment proceedings in New York.

Why, then, must they not be given equal force and effect as a defence when pleaded in Massachusetts as they have been pleaded in the present case? (See p. 9 of Record.)

VI.

Citizenship and its Effect.

It will be argued that the attaching creditors being citizens of Massachusetts, a court of equity can exercise any control over them that it deems necessary in order to secure to the assignees of Bird the relief it finds them entitled to.

Can it, however, take away or infringe upon a constitutional right?

In *Green* v. *Van Buskirk* the point was taken, that as Green, the attaching creditor, was a citizen of New York, he was bound by the laws of New York, and, according to New York law, the mortgage to Van Buskirk had priority over his attachment. The point is disposed of by Mr. Justice Miller in the following words (p. 151): —

"*But the right under the Constitution of the United States and the law of Congress, which Green invoked to his aid, is not at all affected by the question of citizenship.* We cannot see why if Illinois, in the spirit of enlightened legislation, concedes to the citizens of other States equal privileges with her own in her foreign attachment laws, that the judgment

against the personal estate located in her limits of a non-resident debtor, which a citizen of New York lawfully obtained there, should have a different effect given to it under the provisions of the Constitution and the law of Congress because the debtor against whose property it was recovered happened also to be a citizen in New York."

So also in

Warner v. *Jaffray*, 96 N. Y. 248,

it was argued that the attaching creditor, being a citizen of New York, was bound by its laws, and, inasmuch as the assignment in New York was a general one, and according to New York law covered and passed title to the property in Pennsylvania, a citizen of New York could not after the assignment go to Pennsylvania and get an attachment which would take priority over the New York assignment.

The Court held, however, following *Green* v. *Van Buskirk*, that the attaching creditor could not under the United States Constitution be enjoined from proceeding with his attachment.

See also

Moore v. *Church*, 70 Ia. 211.

VII.

Review of Massachusetts Cases.

The case of

Dehon v. *Foster*, 4 Allen, 545; 7 Allen, 57,

cannot be reconciled with

Lawrence v. *Batcheller*, 131 Mass. 506.

In *Dehon* v. *Foster* the Massachusetts court held that it was inequitable for a citizen of Massachusetts, with knowledge

of his debtor's insolvency, to go out of the State and attach and take assets which would otherwise come to the assignee in insolvency, and because it was inequitable, they held it should be enjoined.

Lawrence v. *Batcheller* was an action at law for money had and received, sometimes called an action of equitable assumpsit, brought by assignees in insolvency in Massachusetts against an attaching creditor, a citizen of Massachusetts, who, with knowledge of his debtor's insolvency, had gone out of the State and by process of attachment had taken certain assets that otherwise would have come to the assignees. The case was brought on the theory that because it was inequitable under *Dehon* v. *Foster* for the defendant to take these assets, it was inequitable for him to hold them, and that the action for money had and received being in the nature of a suit in equity, was the proper, if not the only remedy.

The Court, however, held that the attaching creditor should hold the fruits of his vigilance.

It is to be noticed that the counsel for the attaching creditor in *Lawrence* v. *Batcheller* claimed a constitutional right to hold the fruits of his attachments and judgments, and relied on the case of *Green* v. *Van Buskirk* in support of that claim.

It is difficult to see upon what ground the case of *Lawrence* v. *Batcheller* can be supported except upon the constitutional ground claimed by the attaching creditor.

If it rests upon the constitutional ground, then it in effect overrules the case of *Dehon* v. *Foster*.

Lawrence v. *Batcheller* was the latest statement of the Massachusetts law at the time the attachments were made in

New York by Butler and Hayden. Butler and Hayden only undertook to do what Mr. Batcheller had done, and what he had been protected in doing by the Massachusetts court. How, under these circumstances, could their conduct be called unlawful? They violated no statutory provision and no provision of the common law.

In *Lawrence* v. *Batcheller*, Mr. Justice Field in his opinion, p. 508, says: —

"In the case at bar the title to the credits attached which passed to the assignees by virtue of the proceedings in insolvency, whether it be regarded as a legal or an equitable title, was a title subject to the attachments. . . . As neither the *common law* nor our *statutes* give any right of action on the facts agreed in this case, the assignees cannot maintain their suit if the attachments were properly made. . . . It is, to say the least, doubtful if the regularity of the proceedings in those actions, in reference to the attachments and the conclusiveness of the judgments charging the garnishees therein, can be called in question in this suit. *Green* v. *Van Buskirk*, 5 Wall. 307, and 7 Wall. 139."

It is to be noticed that the Court in the case of *Dehon* v. *Foster* undertake to make a distinction between the rights under an attachment and the rights under a judgment, and by implication hold that if allowed to obtain a judgment the attaching creditor cannot be deprived of his rights under it. Chief Justice Bigelow, in his opinion, p. 551, says: —

"Nor is the validity of a foreign law or of the lien acquired under it in any manner called in question. On the contrary, the case proceeds on the ground that the defendants, if allowed to proceed with their action, will perfect the lien which is now inchoate under their attachment, and will thereby establish a valid title to the property of the insolvent debtors under the laws of Pennsylvania."

See comments on this by Mr. Justice Field in *Lawrence* v. *Batcheller*, 131 Mass. 506.

As we have already stated, the rights gained by an attachment are as sacred and as much entitled to protection as those gained by a judgment. If the Massachusetts court is bound to give faith and credit to a judgment, it is equally bound to give faith and credit to an attachment.

VIII.

Opinion of Massachusetts Court considered.

In reply to the points taken in the opinion of Mr. Justice Devens in the case at bar (see Record, pp. 15–18) these plaintiffs respectfully submit that the distinctions attempted to be made between the cases of *Green* v. *Van Buskirk* and *Warner* v. *Jaffray* and the case at bar are not such as will recommend themselves to this Court as worthy of adoption. The New York court in *Warner* v. *Jaffray* certainly held that it had not the power under the United States Constitution to restrain the attaching creditor from continuing his judicial proceedings in Pennsylvania.

As for the suggestion (see p. 18 of Record) that the courts of New York might very properly hold the title of the assignees in insolvency appointed in Massachusetts superior to that of the attaching creditors, it is sufficient to cite

Hibernian Nat. Bank v. *Lacombe*, 84 N. Y. 385,
Matter of Waite, 99 N. Y. 433,

which show conclusively that the assignees have no standing in the courts of New York as against the prior attaching creditors.

The law is the same in other States. See

Kidder v. *Tufts*, 48 N. H. 125.
Paine v. *Lester*, 44 Conn. 198.
Rhawn v. *Pearce*, 110 Ill. 350.

And there is strong ground for holding that under the United States Constitution (Art. IV., Sect. 2), which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," non-resident attaching creditors *must* be allowed the same rights in each State as are accorded to citizens of the State where the attachment is made.

IX.

REPLY TO BRIEF OF DEFENDANTS IN ERROR.

A.

The defendants in error, by admitting (see agreed facts, p. 19 of Record) that the suits in New York were brought in a court of competent jurisdiction, and that the attachments were regular and in conformity with the laws of New York, admitted all that the plaintiffs in error were bound to prove, and not only relieved them from the duty of proving these facts by a duly authenticated record, but induced them to omit producing such a record.

No case is cited which holds that a party must prove facts which are admitted on the record, or that by omitting to prove such facts a party loses any rights, constitutional or otherwise.

In *Green* v. *Van Buskirk*, 7 Wall. 141, as in the case at bar, it was *admitted on the record* that the proceedings in

attachment were regular and in conformity with the laws of the State where the attachment was made, and it does not appear that there was any proof of these facts by a transcript of the record.

In the report of the case in the State court, see

Van Buskirk v. *Green*, 2 Keyes, N. Y. 119,

it clearly appears that the case was tried on an agreed statement as to the judicial proceedings in Illinois, and that no transcript of the record was put in evidence.

B.

The English cases cited by the defendants in error have no application to the question in the case at bar, being all cases where the suit to be enjoined was in a *foreign country*.

It is conceded that a State court may enjoin its citizens from suing in foreign countries and also from suing in other States when no judicial proceedings have been instituted in those States.

Where, however, judicial proceedings are pending in any one of the United States, then the courts of every other State must give those proceedings full faith and credit, *i. e.*, the same force and effect which they have in the State where they are pending; and a failure to give such faith and credit will be a violation of the Constitution of the United States.

The decisions of this court cited by the defendants in error have no application to the case at bar.

C.

The claim made by the defendants in error in division V. of their brief, that inasmuch as the attachments in New York were in the name of Fayerweather and not in the name of

the plaintiffs in error, they can have no benefit from them, is not now open to the defendants in error.

The Court in Massachusetts have found (see Record, p. 11) that "the suits in New York now carried on in his (Fayerweather's) name are subject to their (the plaintiffs in error) control and conducted for their benefit"; and that "the attachments made in New York by said Fayerweather by process of garnishment are to be treated so far as these defendants (now plaintiffs in error) are concerned as made by them."

We find the same statement in the opinion of Mr. Justice Devens. (See Record, p. 15.)

The defendants in error have admitted (see agreed facts, p. 19) that the said suits in New York (*i. e.*, these suits brought by the plaintiffs in error in the name of Fayerweather for their own benefit) were brought in a court of competent jurisdiction, and that the attachments and proceedings were regular and in conformity with the laws of New York.

If the attachments in New York are to be treated (as the Massachusetts court say they are) as if made by these plaintiffs in error, why must not these plaintiffs in error be accorded all the rights of such attaching creditors?

How can the defendants in error be permitted at one moment to say that the plaintiffs in error are to be treated as the attaching creditors and as such enjoined and otherwise harassed, and the next moment to say that the plaintiffs in error have none of the rights of such attaching creditors?

It is admitted by the agreed facts that the attachments in New York are regular and in conformity with the laws of New York (*i. e.*, that they cannot be defeated in New York);

and it appears by the decree that the plaintiffs are entitled to the benefit of those attachments.

How is it material in this suit whether the attachments are in the name of the plaintiffs in error or not?

If the plaintiffs in error are entitled in New York, acting through Mr. Fayerweather, to take the benefit of these attachments (and it appears by the record that they are so entitled), how can the Massachusetts court, under the Constitution, refuse to allow them the same rights which they have in New York?

The plaintiffs in error submit that it cannot be done.

X.

Conclusion.

The plaintiffs in error respectfully submit that for the reasons stated the decree of the Massachusetts court is in conflict with Art. IV., Sects. 1, 2, of the Constitution of the United States, and should be reversed by this court, and the cause remitted to the Supreme Court of Massachusetts with instructions to enter a decree for the plaintiffs in error.

HENRY D. HYDE,
M. F. DICKINSON, Jr.,
HOLLIS R. BAILEY,
For the Plaintiffs in Error.

Office Supreme Court, U. S.
FILED.
OCT 24 1889.

SUPREME COURT OF THE UNITED STATES.

October Term, 1888.

No. [redacted] 774

CHARLES S. BUTLER, AND N. F. T. HAYDEN,
COPARTNERS AS
BUTLER, HAYDEN & COMPANY,
Plaintiffs in Error.

vs.

RICHARD CUNNINGHAM AND HENRY TOLMAN, JR.,
Assignees in Insolvency of Daniel C. Bird.

WRIT OF ERROR

TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief for the Defendants in Error.

EUGENE M. JOHNSON, ATTORNEY.

BOSTON:
E. H. PIERCE, PRINTER, GLOBE BUILDING.
1889.

SUPREME COURT OF THE UNITED STATES

October Term, 1888.

No. [redacted] 74

CHARLES S. BUTLER, AND N. F. T. HAYDEN,
COPARTNERS AS
BUTLER, HAYDEN & COMPANY,
Plaintiffs in Error.

vs.

RICHARD CUNNINGHAM AND HENRY TOLMAN, Jr.,
Assignees in Insolvency of Daniel C. Bird.

BRIEF FOR THE DEFENDANTS IN ERROR.

Brief Statement of the Case.

March 2, 1885 Daniel C. Bird, a citizen and resident of Massachusetts, being unable to meet his bills at maturity suspended payment. The plaintiffs in error, also citizens and residents of Massachusetts, were creditors of said Bird at the time of his suspension. On the night of March 4th or March 5th, 1885, the said Bird informed Hayden, one of the plaintiffs in error, that he had stopped payment and also that the firm of Aaron Claflin & Co., of New York were indebted to him, the said Bird, in a considerable sum. On March 6, 1885,

the plaintiffs in error executed an assignment of their claims against said Bird to one Daniel B. Fayerweather, a resident of the State of New York which assignment was made without consideration and without previous communication with said Fayerweather. On March 11, and March 25th, 1885, two actions were commenced in New York in the name of said Fayerweather on the said claims against said Bird as defendant, and the said firm of Claflin & Co., were summoned as garnishees.

On the 13th March, 1885, a meeting of the creditors of said Bird was held, and a committee appointed to investigate his affairs and to report to the creditors. March 20, 1885, a second meeting of Bird's creditors was held, at which a report was submitted by the said committee. April 23, 1885, a proposal for composition under the statutes of Massachusetts, (Acts of 1884, chap. 236) was filed by said Bird returnable May 4, 1885. On May 20th, the composition proposal having been withdrawn, regular proceedings in insolvency were continued therein, and on the first day of June, 1885, the defendants in error were duly appointed assignees in insolvency of the estate of said Bird by the Court of Insolvency for the County of Plymouth. On June 19, 1885, the assignees brought a bill in equity in the Supreme Judicial Court for the County of Suffolk in the State of Massachusetts against the plaintiffs in error (record pages 2 to the top of page 5.)

The bill prayed that the defendants and their agents, servants, attorneys and solicitors might be enjoined and restrained from proceeding to further continue the suits

against said Bird begun by them in the name of said Fayerweather and from attempting to collect in any manner, by suit or otherwise, whether in the name of said Fayerweather or any other person, for their own benefit, gain and advantage, from said firm of Aaron Claflin & Co., any money or other thing, on account of the said claim against said Bird; that the defendants be ordered to refrain from further prosecuting the said suits in New York in which said suits said Aaron Claflin & Co., were summoned as trustees or garnishees by reason of their indebtedness to said Bird, or, that the defendants be ordered to assign to the plaintiffs as assignees of said Bird in insolvency all their right, title, and interest, present or prospective, legal or equitable by, under, or on account of their claim which they pretend to have assigned to said Fayerweather so that the plaintiffs might have as the effect of said order full right to receive all money due said Bird from said Claflin & Co., without any hindrance or interference upon the part of the defendants therewith; and a prayer for other and further relief.

The plaintiffs in error answered the bill denying any knowledge of Bird's insolvency, and claiming the assignment to Fayerweather was made *bona fide*, and claimed a right to so assign their debt, and that the rights of Fayerweather as a citizen of New York under said assignment, could not be in any way affected by the insolvency of said Bird, (record p. 7.)

They afterwards filed an amended answer in which they claimed that even if the assignment was invalid, the

attachment proceedings in New York were regular, and gave a valid lien on the property attached; and that by the Constitution of the United States, the rights and interests gained by said attachment in New York could not be taken away by the courts of Massachusetts without violating the provision, that full faith and credit must be given in each State to the judicial proceedings of every other State, (record p. 9)

The case was heard by a single judge and reserved by him upon the agreed facts and evidence for the consideration of the full Court. The full Court found (record p. 15): "It is fairly proved that the defendants *with full knowledge that Bird was insolvent and anticipating that there might be proceedings in insolvency in this State and intending to secure to themselves to the exclusion of other creditors the avails of the debt owing to Bird by Claflin & Co.*, made a transfer of their claims to Fayerweather and that the suits in New York now carried on in his name are subject to their control and conducted for their benefit. The attachments made in New York by process of garnisheement are to be treated so far as the defendants are concerned as made by them. . . . . In the case at bar it is true that the defendants had made their attachment through Fayerweather in New York before there had been an assignment in Insolvency in this State actually executed, but this was done with full knowledge on their part that the debtor Bird was embarrassed and had suspended payment and necessarily with intent to avoid the effect of the assignment, só far as the property

attached was concerned. . . . . As residents of this State they cannot be allowed to this extent to defeat the operation of the assignment (In Insolvency) and thus to obtain a preference over other creditors resident here. They are within the limits of the jurisdiction of this Court and amenable to its power and should be enjoined from prosecuting a suit, the result of which if successful will be to work a wrong and injury to other residents of the State." And ordered an injunction as prayed for, whereupon the defendants sued out a suit of error returnable to this Court.

Brief of Argument.

I.

No Federal question is presented in this case for the consideration of this Court.

The error assigned is: "that the Supreme Judicial Court of Massachusetts have decided against certain titles, privileges and immunities specially set up and claimed by the plaintiffs in error under the Constitution of the United States, especially under Art. IV, sec. 1. 2., which recite, "that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

"By virtue of judicial proceedings in the State of New York brought in Courts of competent jurisdiction said Butler and Hayden obtained liens on certain property in New York, said liens are good under the laws of New York and could not be taken from the said Butler and Hayden in that State."

The plaintiffs in error claim that the Supreme Judicial Court of Massachusetts by their decree do not give full faith and credit to judicial proceedings in the Courts of the State of New York as required by Art. IV of the Constitution of the United States.

The manner in which judicial proceedings in New York are to be proved in the Courts of Massachusetts is prescribed by the Revised Statutes of the United States sec. 905.

There must be a *transcript of the record or judicial proceedings, attested by the Clerk with the seal of the Court annexed*, with the certificate of the judge, chief justice or presiding magistrate that the attestation is in due form, and it is only records and judicial proceedings *so authenticated* that are to have such faith and credit given to them in every Court within the United States as they have by law or usage in the courts of the State from which they are taken.

In the case at bar no record or judicial proceeding in the Courts of New York so authenticated, was before the Massachusetts Court. The case was tried by that Court upon certain agreed facts and also upon oral evidence (the facts and evidence before the Court appear in the record p. 19-22 incl.)

In the agreed facts it is stated that " two suits were commenced in the Supreme Court of the County and State of New York in which said Fayerweather is named as plaintiff . . . . . and are still pending but no judgment has yet been obtained thereon. Said suits in New York were brought in a Court of competent

jurisdiction and the attachment and proceedings were regular and in conformity with the laws of New York."

The fact that judicial proceedings were pending in New York was brought to the attention of the Court by a statement in the agreed facts and not in the manner prescribed by the statutes of the United States.

The proof of judicial proceedings in New York not having been made as the statute directs, the plaintiffs in error cannot claim that a right under the Constitution and law has been denied them by the Court of Massachusetts.

Caperton *vs.* Ballard, 14 Wall., 238.

II.

On The Merits of the Case.

In case it is held by this Court that Caperton *vs.* Ballard, does not govern this case, the defendants in error still insist that no Federal question to be considered by this Court appears in the record. The Supreme Judicial Court of Massachusetts has the right, to restrain the citizens of that State, who are within its jurisdiction, from doing any act which shall result in wrong and injury to other citizens of the State; in so doing, it exercises its jurisdiction as a Court of Chancery over the person of the defendants, and compels their obedience by a decree *in personam*. Its power to do this is clear and indisputable.

Dehon *vs.* Foster, 4 Allen, 595.

This case was ably argued, and carefully considered. It has been repeatedly followed by the Courts of other States.

Keyser *vs.* Rice, 47 Md., 203.
Acquidnick Co., *vs.* Chaffee, 13 R. I., 367.
Snook *vs.* Snetzer, 25 Ohio State, 516.
Vermont Canada R. R. Co., *vs.* Vermont Central R. R. Co., 46 Vt., 792, 797.
Claflin *vs.* Franklin, 67 Howard Practice, N. Y., 286.

The doctrine is recognized by the text writers
2nd Story's Equity Jurisprudence sec. 900.
Bispham on Equity, 4th Ed., sec. 424.
1st High on Injunctions, 2nd Ed., sec. 106.
Wharton Conflict of Laws, sec. 711, note *a*.
Bigelow on Estoppel, 4th Ed., 246.
and in numerous cases,

Great Falls Man. Co., *vs.* Worcester, 23 N. H., 462.
Bashly *vs.* Munday, 5 Madd., 307.
Beckford *vs.* Kemball, 1 Sim., & Stu., 7.
Alwood *vs.* Banks, 2 Bea. 192.
Hill *vs.* Turner, 1 Atk., 515.
Glasscock *vs.* Lang, 3 Myl. & Cr., 451.
Pope *vs.* Carnegie, Law Reps., 1st Chancy, 320.
Exparte Tait, Law Reps., 13 Eq., 311.
Re Chapman, Law Reps., 15 Eq., 75.

and the doctrine has been approved by this Court in

Massey *vs.* Watts, 6 Cranch, 148.
Phelps *vs.* McDonald, 99 U. S., 298.
Corbett *vs.* Nutt, 10 Wall., 464.

The plaintiffs in error were before the Court in Massachusetts and it was immaterial that the *res* of the controversy was beyond its territorial jurisdiction. The Court had the power to compel them by its decree, to do all things necessary according to the law of the State where the property was situated, which they could do of their own will, to give the decree full effect.

The plaintiffs in error having control of the suits in New York, had the *power* to discontinue the actions, and the Court in Massachusetts had the right by its decree to compel them to do what they had the power to do voluntarily.

2. The controversy is between citizens of Massachusetts as to their relative rights in the personal property of an insolvent debtor who is a resident of the same State, a controversy which would not have arisen but for the acts of these plaintiffs in error in attempting to secure an unjust advantage over other citizens.

The validity of the proceedings in New York is in no manner called in question.

III.

An attachment lien is not, as plaintiffs in error claim in their brief a final decree of the Court. It has been held in New York that the order granting an attachment

is discretionary in the Court ordering it, and being discretionary cannot be reviewed as matter of law by the Court of Appeals,

Sortwell *vs.* Field, 68 N. H., 341.

But the lien is incohate, and the property attached is held, in New York as elsewhere, to await the result of the proceedings; if a judgment for the plaintiff is obtained, the lien becomes perfected and the property is applied to satisfy the judgment. The attachment is granted in order that the property may be so applied, *when* the judgment is obtained, but until judgment, the plaintiff in the suit has only a right to have the attached property so held, that it may be applied to satisfy the judgment when obtained.

IV.

The plaintiffs in error have not the same right as a creditor resident in New York.

It is not denied that a New York creditor under the laws of the State of New York and under the authority of the decision of this Court in

Pennoyer & Neff, 95 U. S., 714,

would have the right to apply the property, found within the State, belonging to a non-resident debtor to the payment of his claim.

The plaintiffs in error by a pretended assignment to a resident of New York, to enable them to bring suits in his name, undertake to obtain the same advantage for themselves, as is given by law to a citizen of New York.

Every State preserves exclusive jurisdiction and sovereignty over persons and property within its territory, and the exercise of this jurisdiction over persons and property within the State limits will often affect persons and property without it.

Pennoyer *vs.* Neff. Supra.

The jurisdiction of the Courts of the State of New York over the *property* of a non-resident found within its limits, and the jurisdiction of the Courts of Massachusetts over the *persons* of the plaintiffs in error, are both exclusive, and for the same reason.

The Courts of Massachusetts may compel citizens of Massachusetts to transfer rights and property elsewhere situated and the exercise of this jurisdiction over the citizens in no manner interferes with the control of the State within which it is situated, over the property.

Penn *vs.* Ld. Baltimore, 1 Ves., 444.
Watkins *vs.* Holman, 16 Pet., 25.
Corbett *vs.* Nutt, 10 Wall., 464.

The decree of the Massachusetts Court compels the plaintiffs in error to give up rights acquired in New York but does not interfere with any rights of the Courts of New York to control the property found in New York.

V.

The General Equities of the Case.

But the plaintiffs in error do not present a case which entitles them to the consideration of this Court, on equitable grounds.

They attempt to obtain for themselves by a pretended assignment to a citizen of New York certain rights and privileges, to which they were not entitled under the laws of Massachusetts. The Court of Massachusetts declares the assignment void and that the suits in New York are to be treated as if brought by plaintiffs in error personally. The plaintiffs in error then set up the claim, that *if* they had brought the suits in their own names, *they* would have obtained a lien valid under the laws of New York and that for that reason their Constitutional rights have been interfered with. No Constitutional rights can be claimed by them by virtue of any judicial proceedings in New York in their own names, because no such proceedings exist. The suits in New York are brought in the name of a plaintiff who has no claim against the defendant, whose assignment is void, for the benefit of the plaintiffs in error, who by this method use the judicial process of the Courts of New York to aid them in an attempt to secure an unjust and inequitable advantage over other citizens of Massachusetts. The Constitution of the United States does not expressly authorize citizens of a State to injure other citizens of the same State; and a decree of a State court which protects citizens within its jurisdiction against the wrongful acts of other citizens within its jurisdiction, can be declared contrary to the Constitution of the United States, only when the rights of any citizen, under the Constitution, are clearly injured by the decree.

The plaintiffs in error, have no right under the Constitution of the United States to do wrong. They claim no other right in this case.

VI.

1. The jurisdiction of this Court is limited to the Federal question raised.

2. No Federal question was raised in the Court below in such a manner as to require a decision by the Court below or to authorize this Court to review the decision in this case.

3. If this Court shall hold that a Federal question was properly presented in the Court below, and is properly reviewable here, the decree of the Supreme Judicial Court of Massachusetts was correct and infringes no rights of the plaintiffs in error under the Constitution of the United States.

The defendants in error respectfully request that the Writ of Error be dismissed with costs.

EUGENE M. JOHNSON, of Counsel.